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In the Supreme Court of the United States

OCTOBER TERM, 1990

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., ET AL., PETITIONERS

v.

AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Agency for International Development's (AID's) requirement that its domestic grantees agree not to sub-grant AID funds to foreign non-governmental organizations that perform or actively promote abortion as a method of family planning violates the First Amendment.

2. Whether AID's limitation on the sub-granting of AID funds conflicts with statutory limitations on the use of federal funds for abortion-related activities abroad.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Bantam Books v. *Sullivan*, 372 U.S. 58 (1963) .. 8
Bates v. *City of Little Rock*, 361 U.S. 516 (1960) .. 8
Botany Worsted Mills v. *United States*, 278 U.S. 282 (1929) .. 11, 12
DKT Memorial Fund v. *AID*, 887 F.2d 275 (D.C. Cir. 1989), aff'g 691 F. Supp. 394 (D.D.C. 1988) .. 8, 12
Lyng v. *International Union, United Automobile Workers*, 485 U.S. 360 (1988) .. 7, 9, 10
Meyer v. *Grant*, 486 U.S. 414 (1988) .. 9
NAACP v. *Alabama*, 357 U.S. 449 (1958) .. 8
Pathfinder Fund v. *AID*, 746 F. Supp. 192 (D.D.C. 1990), appeal held in abeyance, No. 90-5388 (D.C. Cir. Feb. 22, 1991) .. 7, 8
Perry v. *Sindermann*, 408 U.S. 593 (1972) .. 6
Powers v. *Ohio*, No. 89-5011 (Apr. 1, 1991) .. 9
Regan v. *Taxation with Representation*, 461 U.S. 540 (1983) .. 7, 9
Roberts v. *United States Jaycees*, 468 U.S. 609 (1984) .. 5
United States v. *O'Brien*, 391 U.S. 367 (1968) .. 5
United States v. *Verdugo-Urquidez*, 110 S. Ct. 1056 (1990) .. 9

Constitution and statutes: Page

U.S. Const. Amend. I 9, 11
Foreign Assistance Act of 1961, 22 U.S.C. 2151 *et seq.* 2
22 U.S.C. 2151b(b) 2, 11
22 U.S.C. 2151b(f) 2, 11

Miscellaneous:

Statement of the United States of America at the United Nations International Conference on Population (Second Session), Mexico, D.F., August 6-13, 1984 2

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-16a, 33a-49a) are reported at 915 F.2d 59 and 838 F.2d 649. The first opinion of the district court (Pet. App. 50a-74a) is reported at 670 F. Supp. 538. The second opinion of the district court (Pet. App. 17a-32a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1990. On November 30, 1990, Justice Marshall extended the time for filing a petition for a writ of certiorari to and including January 17, 1991, and the petition was filed on that date. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Foreign Assistance Act of 1961, 22 U.S.C. 2151 *et seq.*, authorizes the President "to furnish assistance, on such terms and conditions as he may determine, for voluntary population planning." 22 U.S.C. 2151b(b). The Act further provides, however, that funds provided by the United States may not "be used to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions [*sic*]." 22 U.S.C. 2151b(f).

In 1984, the President announced his policy (known as the Mexico City Policy) with regard to voluntary population planning assistance and abortion, which states in relevant part:

> The United Nations Declaration of the Rights of the Child [1959] calls for legal protection for children before birth as well as after birth. In keeping with this obligation, the United States does not consider abortion an acceptable element of family planning programs and will no longer contribute to those of which it is a part. Accordingly, when dealing with nations which support abortion with funds not provided by the United States Government, the United States will contribute to such nations through segregated accounts which cannot be used for abortion. Moreover, the United States will no longer contribute to separate non- governmental organizations which perform or actively promote abortion as a method of family planning in other nations. * * *

Statement of the United States of America at the United Nations International Conference on Population (Second Session), Mexico, D. F., August 6-13, 1984. Pet. App. 4a-5a, 53a-55a.

2. The Agency for International Development (AID) administers grants provided under the Foreign Assistance Act, including grants and cooperative agreements to carry out population planning programs abroad. AID disperses the funds to domestic non-governmental organizations (NGOs), such as petitioner Planned Parenthood Federation of America, Inc. (PPFA), that then sub-grant the AID funds to foreign NGOs for family planning projects in foreign countries. Pet. App. 52a-53a.

Since 1985, AID population planning grants and cooperative agreements have contained a clause, captioned the "Standard Provision to be Used in Grants and Cooperative Agreements with U.S. Nongovernmental Organizations" (the Standard Clause), that implements the President's Mexico City Policy through specific eligibility provisions. Pet. App. 55a. The Standard Clause requires domestic NGOs to agree that they will not sub-grant AID funds to foreign NGOs that perform or actively promote abortion as a method of family planning abroad. Pet. App. 77a.[1] Domestic NGOs are not prohibited, as a condition

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[1] Under the Standard Clause, abortion "is a method of family planning when it is for the purpose of spacing births." Pet. App. 80a. This "does not include abortions performed if the life of the mother would be endangered if the fetus were carried to term or abortions performed following rape or incest," nor does it include "referrals" for abortion in those circumstances. *Id.* at 80a-81a. The Standard Clause also states that "passively responding to a question regarding where a safe, legal abortion may be obtained is not considered active promotion if the question is specifically asked by a woman who is already pregnant, the woman clearly states that she has already decided to have a legal abortion, and the family planning counselor reasonably believes that the ethics of the medical profession in the country requires a response regarding where it may be obtained safely." *Id.* at 81a. A similar clause requires foreign NGOs that are direct AID grantees to certify that they will not engage in abortion activities while receiving AID funds. *Id.* at 19a.

of receiving AID grant funds, from using non-AID funds to perform abortions or actively to promote abortion as a method of family planning abroad, or from sub-granting non-AID funds to foreign NGOs that engage in those activities. *Id.* at 6a-7a.

3. Prior to the announcement of the Mexico City Policy, AID and PPFA had entered into a cooperative agreement, scheduled to expire on December 31, 1987, that entitled PPFA to sub-grant AID funds to foreign NGOs. On January 13, 1987, petitioners filed a complaint for declaratory and injunctive relief to prevent implementation of the Standard Clause as part of PPFA's new cooperative agreement with AID. Pet. App. 21a. They contended that implementation of the Clause was contrary to the Foreign Assistance Act and violated their constitutional rights to speech, association, and privacy. *Id.* at 21a-23a. The district court dismissed the complaint, holding that implementation of the Mexico City Policy was authorized by statute and that the constitutional issues raised by petitioners were nonjusticiable "political" questions. *Id.* at 50a-74a. The court of appeals affirmed the district court's statutory holding, but reversed the holding that petitioners' constitutional claims were nonjusticiable and remanded for further proceedings. *Id.* at 33a-49a.[2]

[2] Because PPFA's 1983 cooperative agreement with AID was due to expire, AID gave PPFA a short extension to phase out its funded programs while petitioners' appeal was pending. Pet. App. 20a n. 2. On remand, the parties negotiated a stipulation, approved by the district court, requiring AID to provide continued federal assistance to PPFA for the programs covered by the 1983 cooperative agreement without requiring PPFA to abide by the Standard Clause. *Ibid.* AID reserved its right, however, to enforce the Mexico City Policy by means other than the Standard Clause, and PPFA agreed to obtain AID's approval of every sub-grant of AID funds, which AID could withhold in its discretion.

4. On remand, the district court again dismissed the complaint. Pet. App. 17a-32a. The court stated that, even assuming *arguendo* that the Standard Clause infringed petitioners' First Amendment rights of speech and association and could be sustained only if it passed the "strict scrutiny" test of *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984) and *United States* v. *O'Brien*, 391 U.S. 367 (1968), the Standard Clause satisfied that test because it was necessary to serve the substantial governmental interest set forth in the President's Mexico City Policy and it was the least restrictive means of implementing that policy. Pet. App. 26a-30a. The district court also held that because the Standard Clause did not place any affirmative legal obstacles in the path of American citizens who sought abortion-related advice from health care facilities abroad, it did not violate the claimed constitutional right of privacy of petitioner Jane Doe, who sought such advice from an AID-funded facility in Nigeria. *Id.* at 30a-32a.[3]

5. The court of appeals affirmed the district court's second decision. Pet. App. 1a-16a. The court held that the Standard Clause "does not prohibit [petitioners] from exercising their first amendment rights," but simply denies them a federal subsidy for the exercise of those rights. *Id.* at 10a-11a. Under the Standard Clause, petitioners could

[3] On April 30, 1990, after the district court dismissed the complaint, AID gave PPFA written notice that AID was terminating the 1983 cooperative agreement because PPFA's operations under that agreement were no longer consistent with AID's program. AID provided PPFA with a phase-out schedule for its current projects under which funding for all projects would cease by October 31, 1990. See Pet. App. 6a. AID invited PPFA, however, to apply for a new cooperative agreement that would begin November 1, 1990, and AID outlined substantive program changes that would have to be incorporated in such an agreement. PPFA submitted a revised application for a new cooperative agreement on August 29, 1990.

"use their own funds to pursue whatever abortion-related activities they wish in foreign countries." *Id.* at 11a. Indeed, PPFA could "grant AID funds to a foreign NGO for all aspects of family planning except abortion and * * * use its own funds to establish an abortion-related facility next door." *Ibid.*

The court of appeals recognized, as petitioners alleged, that the Standard Clause imposed foreign aid restrictions that could discourage foreign NGOs from working with petitioners on abortion-related projects. As the court explained, however, any consequent harm to petitioners "is the result of choices made by foreign NGOs to take AID's money rather than engage in non-AID funded cooperative efforts with [petitioners]." Pet. App. 11a. "Such an incidental effect from the refusal to subsidize the exercise of a constitutional right obviously is not what the Supreme Court considers an 'obstacle in the path' of plaintiffs seeking to exercise the right." *Id.* at 12a.

The court of appeals also rejected petitioners' contention that the Standard Clause imposes an "unconstitutional condition" on the receipt of federal funds. Pet. App. 12a. Unlike the plaintiff in *Perry* v. *Sindermann*, 408 U.S. 593 (1972), who "was forced to choose between his employment and his right to freedom of speech," PPFA "may continue to participate as a conduit for AID funds that are restricted to non-abortion activities while maintaining with [its] own funds abortion-related activities in the same countries." Pet. App. 12a-13a. The court of appeals observed that "the wisdom of, and motivation behind" the President's Mexico City Policy "are not justiciable issues," *id.* at 13a, and that the Standard Clause "must be upheld if rationally related to [the President's] policy goal," *id.* at 14a. The court concluded that the Standard Clause, which "goes no further than necessary to implement an otherwise nonjusticiable

decision limiting the class of beneficiaries of foreign aid," *ibid.*, satisfies that test. *Id.* at 15a.

Finally, the court of appeals rejected the argument of individual petitioner Jane Doe that the Standard Clause violates her claimed constitutional right of privacy by preventing her from receiving abortion information at an AID-funded clinic in Nigeria. Pet. App. 15a. The court of appeals pointed out that the Standard Clause would not prevent Doe from obtaining non-abortion services at an AID-funded clinic and abortion services at a non-AID-funded clinic. Moreover, the Standard Clause would not prevent Doe's physician from working at an AID-funded clinic even if he or she performs or actively promotes abortion at a facility unrelated to that clinic. *Id.* at 15a-16a.[4]

ARGUMENT

The court of appeals' decision breaks no new constitutional ground. The court simply applied settled principles enunciated by this Court in *Lyng* v. *International Union, Automobile Workers*, 485 U.S. 360 (1988), and *Regan* v. *Taxation with Representation*, 461 U.S. 540 (1983), which hold that the government is under no obligation to subsidize the exercise of a fundamental right. The court of appeals' decision does not conflict with any decision of this Court or another court of appeals. Rather, the court's constitutional holding is consistent with *Pathfinder Fund* v. *AID*,

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[4] Thereafter, AID informed PPFA it had tentatively budgeted between $3 million and $4 million to support PPFA projects during fiscal year 1991 under a new cooperative agreement containing the Standard Clause. PPFA refused to sign the agreement (Pet. 3 n.3) and sought interim relief to compel AID to provide continued funding for 33 projects under the 1983 cooperative agreement. The court of appeals denied the requested relief on October 10, 1990, and this Court denied a similar request on October 29, 1990. 111 S. Ct. 335 (No. A-300).

746 F. Supp. 192 (D.D.C. 1990), appeal held in abeyance, No. 90-5388 (D.C. Cir. Feb. 22, 1991), and its statutory holding, also challenged by petitioners, is consistent with *DKT Memorial Fund* v. *AID*, 887 F.2d 275 (D.C. Cir. 1989). Additionally, the decision involves only federal grants for population planning activities in foreign countries. Further review, accordingly, is unwarranted.

1. Petitioners primarily argue (Pet. 9-20) that the Standard Clause violates the First Amendment by limiting their rights of speech and association. There is no merit to that claim. As the court of appeals explained, the Standard Clause prevents PPFA from sub-granting AID funds to foreign NGOs that perform or actively promote abortions as a method of family planning. The Clause does not prevent PPFA or its members from associating with or providing non-AID funds to those organizations. Petitioners may find that they have fewer opportunities to associate with foreign NGOs if PPFA cannot provide AID funds to organizations that perform or promote abortions, but that is simply an incidental effect of the government's decision against subsidizing the activities of abortion advocates in foreign countries.

Petitioners contend (Pet. 11-14) that the injuries they allege are not "incidental," citing *Bantam Books* v. *Sullivan*, 372 U.S. 58 (1963), *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960), and *NAACP* v. *Alabama*, 357 U.S. 449 (1958). None of those cases, however, involved a government decision not to subsidize a particular activity.[5] As this Court

[5] In *Bantam Books*, four publishers challenged the State's practice of intimidating their distributors by notifying them that the publishers' books were "objectionable" and could result in an obscenity prosecution. See 372 U.S. at 61-64. In *Bates* and *NAACP*, government officials attempted, through criminal and contempt sanctions, to coerce the NAACP to disclose its membership list. 361 U.S. at 517; 357 U.S. at 451.

recognized in *Lyng* v. *International Union*, a government decision not to subsidize a given activity "has no unconstitutional impact on the right of individuals to associate for various purposes." 485 U.S. at 366. The same is true here. This Court made clear in *Lyng* that freedom of association is infringed by a government restriction only if that restriction "directly and substantially" interferes with the ability to associate by "order[ing]" people not to associate together, by "prevent[ing]" them from associating together, or by "burden[ing]" their ability to do so "in any significant manner." *Ibid.* The Standard Clause does none of those things. See also, *e.g.*, *Regan* v. *Taxation with Representation*, 461 U.S. 540, 549 (1983) ("a legislature's decision not to subsidize the exercise of a fundamental right does not infringe that right").[6]

Petitioners assert (15-17) that the court of appeals' treatment of the Standard Clause as a "mere refusal to subsidize" is a mischaracterization because the Standard Clause denies a federal subsidy to a foreign NGO that performs or actively promotes abortion even if the foreign NGO conducts those activities with non-federal funds. The question here, however, is how the Standard Clause affects *petitioners'* asserted rights.[7] See *Powers* v. *Ohio*, No. 89-5011 (Apr. 1, 1991), slip op. 10. The Standard Clause simply imposes

[6] Petitioners mistakenly rely (Pet. 13-14) on *Meyer* v. *Grant*, 486 U.S. 414 (1988), and other cases requiring "strict scrutiny" when government restrictions ostensibly aimed at conduct in fact seek to suppress expression. The Standard Clause does not limit either expression or association by petitioners; they are free to speak about and use non-AID funds to promote abortion as a method of family planning abroad by themselves or in concert with any foreign NGOs they choose.

[7] It is doubtful (but not material to the disposition of this petition) whether a foreign entity operating abroad can assert a First Amendment right. Cf. *United States* v. *Verdugo-Urquidez*, 110 S. Ct. 1056 (1990).

a condition on PPFA's use of federally granted funds—it cannot sub-grant them to foreign NGOs that perform or promote abortions. It does not prevent PPFA from continuing to advocate abortion or from subsidizing foreign NGOs with non-federal funds. The government's restriction in this case, like the government's refusal in *Lyng* to give food stamps to striking workers, is simply a "refusal to subsidize" a particular activity.[8]

2. Petitioners contend (Pet. 20-22) that the Standard Clause also "interferes with the right of American women overseas, such as [Jane] Doe, to make fully informed choices about contraception and child-bearing without censorship imposed by the American government." Nothing in the Standard Clause, however, prevents Jane Doe in Nigeria or other American women residing overseas from seeking information about abortion from the many non-AID funded health clinics that exist. It may be that certain foreign NGOs do not provide that information because they have determined that they would rather receive AID funds than provide or actively promote abortion services, but that is a consequence of the foreign NGO's free choice. The United States' refusal to subsidize foreign NGOs that provide abortions does not prevent a woman from, or penalize her for,

[8] Petitioners also argue that "the exercise of foreign policy is not automatically immune from strict scrutiny" (Pet. 17). The court of appeals, however, did not refuse to apply "strict scrutiny" because the Standard Clause involved foreign policy; instead, it refused to apply strict scrutiny because, as in *Lyng*, 485 U.S. at 370, no fundamental interest was at stake. Pet. App. 12a. Petitioners rely on various statements from the court of appeals' opinion indicating the court's reluctance to second-guess foreign policy judgments (Pet. 17-18). The court made those statements, however, in support of its conclusion that the "wisdom of, and motivation behind," the Mexico Policy Statement is not justiciable—not in respect to the constitutionality of the Standard Clause, which the court concluded is subject to judicial review. Pet. App. 13a-14a.

seeking out a health care provider that elects to provide abortion services. See Pet. App. 15a-16a.

3. Petitioners next argue (Pet. 22-24) that the Standard Clause violates the First Amendment because it requires PPFA "to espouse and circulate particular ideas—ideas that it finds repellent." This argument is devoid of merit. The Standard Clause simply restricts the sub-granting of AID funds; it does not compel PPFA to espouse any particular ideas. If PPFA objects to sub-granting AID funds only to foreign NGOs that do not perform or actively promote abortion, it can simply decline to participate in the AID voluntary population planning program. It has no right to insist in court that a government program in which it does not wish to participate be changed into the type of program in which it would like to participate. Whether PPFA chooses to participate or not, PPFA remains free, apart from the sub-granting of federal funds, to espouse whatever beliefs it chooses concerning abortion.

4. Finally, petitioners are mistaken in asserting (Pet. 25-28) that the Standard Clause is inconsistent with the Foreign Assistance Act. As the court of appeals recognized, the Foreign Assistance Act gives the President broad discretion "to furnish assistance, on such terms and conditions as he may determine, for voluntary population planning." 22 U.S.C. 2151b(b). The President's Mexico City Policy is an appropriate exercise of his authority. The Standard Clause, which implements that policy, is consistent with the Act's only relevant limitation—that foreign assistance funds may not "be used to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions." 22 U.S.C. 2151b(f).

Contrary to petitioners' assertion (Pet. 25), the court of appeals did not disregard this Court's dictum that "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted*

Mills v. *United States*, 278 U.S. 282, 289 (1929). It simply held that the Standard Clause is consistent with the Foreign Assistance Act, as construed in light of its language, purpose, and history. The only other court of appeals to consider petitioners' statutory arguments has correctly rejected them. *DKT Memorial Fund*, 887 F.2d at 280-281, aff'g 691 F. Supp. 394, 401-403 (D.D.C. 1988). There is no warrant, accordingly, for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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